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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY

IN THE MATTER OF THE SEARCH)
OF A RESIDENCE IN APTOS,) NO. 17-MJ-70656
)
) SAN FRANCISCO, CALIFORNIA
) THURSDAY, MARCH 1, 2018
_____)

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND

RECORDING 11:12 A.M. - 11:40 A.M.

APPEARANCES:

FOR THE GOVERNMENT UNITED STATES ATTORNEY
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RETIRED OFFICIAL COURT REPORTER, USDC

1 THURSDAY, MARCH 1, 2018

11:12 A.M.

2 (TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSELS' FAILURE TO
3 IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER
4 ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

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6 PROCEEDINGS

7 **THE COURT:** 17-CV-03944, USA VERSUS SEARCH WARRANT.

8 **MS. GARCIA:** GOOD MORNING, YOUR HONOR. JULIE GARCIA
9 FOR THE UNITED STATES.

10 **THE COURT:** GOOD MORNING.

11 **MS. DORVALL:** GOOD MORNING. SHARON DORVALL FOR
12 MR. SPENCER.

13 **THE COURT:** ALL RIGHT. GOOD MORNING.

14 SO MR. SPENCER IS NOT PRESENT. IS THE DEFENDANT
15 WILLING TO WAIVE HIS PRESENCE THIS MORNING?

16 **MS. DORVALL:** YES, YOUR HONOR.

17 **THE COURT:** SO THE COURT WILL WAIVE HIS PRESENCE AT
18 THE HEARING, WHICH IS, IN ANY EVENT, ABOUT A SEARCH WARRANT,
19 ALTHOUGH HE IS THE PARTY IN INTEREST, AN INTERESTED PARTY WITH
20 THE SEARCH WARRANT.

21 SO THIS IS -- THE GOVERNMENT IS SEEKING UNDER THE ALL
22 WRITS ACT AN ORDER COMPELLING MR. SPENCER TO DECRYPT, I GUESS
23 IS THE WORD, THREE DEVICES; THE IPHONE 7, THE TRANSCEND 1 TB
24 EXTERNAL HARD DRIVE, AND THE ALIENWARE LAPTOP.

25 I UNDERSTAND MR. SPENCER IS OPPOSING THE ORDER ON THE

1 GROUND OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST
2 SELF-INCRIMINATION.

3 **MS. DORVALL:** YES, YOUR HONOR.

4 **THE COURT:** OKAY. SO I DO BELIEVE AN ALL WRITS ACT
5 ORDER HERE WOULD BE APPROPRIATE, JUST IN TERMS OF THE ALL WRITS
6 ACT. THERE ISN'T ANY OTHER STATUTE THAT APPLIES. THE
7 ENCRYPTION AND THE REFUSAL TO DECRYPT IS INTERFERING WITH THE
8 COURT'S SEARCH WARRANT, SO I DON'T KNOW -- I DON'T BELIEVE YOU
9 REALLY OPPOSE THAT SO MUCH.

10 **MS. DORVALL:** THE REFUSAL TO DECRYPT --

11 **THE COURT:** WELL, THAT THE ALL WRITS ACT IS AN
12 APPROPRIATE VEHICLE. THERE'S THE SEPARATE ISSUE OF THE FIFTH
13 AMENDMENT.

14 **MS. DORVALL:** YES.

15 **THE COURT:** ANYWAY, I FIND THAT'S APPROPRIATE.
16 SO THEN WE GO TO THE FIFTH AMENDMENT PRIVILEGE HERE.
17 I GUESS MY FIRST QUESTION IS, WHAT IS THE TESTIMONIAL ASPECT OF
18 THE DECRYPTION THAT THE DEFENDANT IS CLAIMING?

19 **MS. DORVALL:** HE WOULD BE FORCED TO ADMIT POSSESSION,
20 CONTROL, AND IN SOME MANNER THAT HE COULD MANIPULATE THE
21 DEVICE.

22 **THE COURT:** OKAY. SO LET'S START WITH POSSESSION.
23 WITH RESPECT TO THE IPHONE 7 -- SO HERE THE GOVERNMENT IS NOT
24 DISPUTING THERE IS SOME TESTIMONIAL ASPECT TO THE DECRYPTION.
25 THEY'RE ARGUING THE FOREGONE CONCLUSION DOCTRINE. SO PRETTY

1 NARROW IN THAT SENSE.

2 SO WITH RESPECT TO POSSESSION OF THE IPHONE 7, HE
3 ALREADY PUT HIS PASSWORD INTO THE -- IN THE IPHONE 7. SO THAT
4 IT'S HIS PHONE IS A FOREGONE CONCLUSION, IS IT NOT?

5 **MS. DORVALL:** THAT -- THAT THE PHONE IS HIS IS A
6 FOREGONE CONCLUSION, YES.

7 **THE COURT:** OKAY. ALL RIGHT. SO THERE'S NO -- HE'S
8 NOT INCRIMINATING HIMSELF IN THAT WAY. ALL RIGHT.

9 SO THEN WITH RESPECT TO THE EXTERNAL -- THE ALIENWARE
10 LAPTOP, THE SAME THING, HE ALSO PUT IN HIS -- I BELIEVE
11 ACCESSED IT IN FRONT OF LAW ENFORCEMENT WITH THE PASSCODE.

12 **MS. DORVALL:** YES. I BELIEVE, THOUGH, IT'S IMPORTANT
13 TO NARROW DOWN THE ISSUE THAT IT'S NOT JUST POSSESSION OF THE
14 PHONE ITSELF. THEY WANT ACCESS TO APPS WITHIN THE PHONE.

15 **THE COURT:** NO, NO, I UNDERSTAND. BUT I'M FIRST
16 JUST -- I WANT TO PIERCE IT OUT.

17 **MS. DORVALL:** OKAY.

18 **THE COURT:** BECAUSE CLAIMING THAT THERE IS A
19 VIOLATION OF THE FIFTH AMENDMENT TO SELF-INCRIMINATION, SO
20 THERE'S NOT A PRIVILEGE AGAINST THE GOVERNMENT GETTING EVIDENCE
21 THAT IS INCRIMINATING, RIGHT? IT HAS TO BE SELF-INCRIMINATION,
22 COMPELLED SELF-INCRIMINATION. SO I WANT TO BE PRECISE ABOUT
23 WHAT IS THE TESTIMONIAL ASPECT.

24 SO THERE'S NO -- SO IT'S A FOREGONE CONCLUSION THAT
25 IT'S HIS PHONE. IT'S A FOREGONE CONCLUSION THAT IT'S HIS

1 LAPTOP. OKAY. NOW, IF IT'S A FOREGONE CONCLUSION IT'S HIS
2 PHONE, I THINK IT'S A FOREGONE CONCLUSION THAT ANY APP ON THE
3 PHONE IS HIS APP.

4 **MS. DORVALL:** I BELIEVE THE ISSUE OF FOREGONE
5 CONCLUSION IS NOT WHETHER OR NOT IT'S HIS APP. THE ISSUE IS
6 WHETHER OR NOT THAT APP CONTAINS INCRIMINATING INFORMATION.

7 **THE COURT:** OKAY. ALL RIGHT. GOOD. SO I -- THAT'S
8 WHY I'M TAKING IT IN STEPS.

9 OKAY. SO THEN -- SO AT LEAST WITH THE PHONE AND THE
10 LAPTOP, THEN -- I DON'T HAVE TO SAY WE'RE IN AGREEMENT, BUT I
11 FIND IT'S A FOREGONE CONCLUSION THAT ANY APPS ON THOSE DEVICES
12 ARE HIS.

13 NOW, WITH RESPECT TO THE HARD DRIVE, HE HAS NOT PUT
14 ANYTHING, BUT I THINK THE EVIDENCE ESTABLISHES BEYOND ANY
15 DOUBT, FRANKLY, THAT THE HARD DRIVE BELONGS TO HIM. IT WAS
16 FOUND IN HIS ROOM. IT -- IT'S CONSISTENT WITH MR. SPENCER'S
17 TESTIMONY. IT'S CONSISTENT WITH THE KICK DEVICES AND THE LIKE.

18 SO DID YOU HAVE AN ARGUMENT AS TO THAT?

19 **MS. DORVALL:** HE WOULD, FOR PURPOSES OF THIS MOTION,
20 WOULD CONCEDE THAT THE ITEMS WERE FOUND IN HIS ROOM. THE
21 EVIDENCE THAT THEY'RE USING FOR THE FOREGONE CONCLUSION THAT
22 THEY ARE HIS AND SOLELY WITHIN HIS POSSESSION ARE BASED ON THAT
23 OF HIS CODEFENDANT. SO WHAT HE WOULD CONCEDE IS IF THEY WERE
24 FOUND IN HIS ROOM.

25 **THE COURT:** OKAY. ALL RIGHT. THAT'S FINE. THAT'S

1 ALL HE'S CONCEDING.

2 I'M FINDING IT'S A FOREGONE CONCLUSION. AND LET'S --
3 I KNOW YOU MADE SOME ARGUMENT ABOUT HIS CODEFENDANT, BUT HIS
4 CODEFENDANT -- OF COURSE, THE REASON MR. SPENCER WAS EVEN
5 BROUGHT TO LAW ENFORCEMENT'S ATTENTION WAS BECAUSE HIS
6 CODEFENDANT, IMMEDIATELY UPON THE EXECUTION OF THE FIRST SEARCH
7 WARRANT, DIRECTED THEM TO HIM, AND HE HIMSELF THEN WAS
8 FORTHCOMING WITH THE GOVERNMENT.

9 AND THEN WE HAVE KIK MESSAGES THAT HAVE BEEN
10 RECOVERED THAT CORROBORATE A LOT OF WHAT HE SAID, AS WELL. AND
11 THEN WE HAVE THE FACT THAT MR. PETERSON HIMSELF HAS THE
12 IDENTICAL HARD DRIVE, WHICH IS CONSISTENT WITH HIS TESTIMONY
13 ABOUT HOW HE GOT THAT HARD DRIVE AND THAT MR. SPENCER HAD THAT.

14 SO I FIND THAT IT'S A FOREGONE CONCLUSION, AS WELL,
15 THAT HE OWNS THE HARD DRIVE, AND SO THERE'S NOTHING -- NOT
16 VIOLATING HIS FIFTH AMENDMENT PRIVILEGE BY REQUIRING HIM TO
17 DECRYPT THE HARD DRIVE.

18 AND THEN I GUESS A SECOND TESTIMONIAL ASPECT WOULD BE
19 THAT HE KNOWS THE PASSWORD, RIGHT, TO DECRYPT THE APPS ON THE
20 DEVICES.

21 **MS. DORVALL:** AT THIS POINT, I DON'T BELIEVE THAT IS
22 A GIVEN, AND PART OF THE REASON FOR THAT IS WHEN THE FBI
23 INTERVIEWED HIM, HE INDICATED THAT HE COULD NOT REMEMBER THE
24 PASSCODE FOR HIS IPHONE. HE HAD TO USE, I BELIEVE, HIS THUMB
25 TO DECRYPT IT. AND NOW THAT TIME HAS PASSED -- EVEN AT THE

1 TIME THEY EXECUTED THE SEARCH WARRANT, HE HAD NO PASSWORD.

2 **THE COURT:** WELL, THAT'S A DIFFERENT ISSUE, RIGHT?
3 THAT WOULD, I SUPPOSE, COME UP LATER IN A CONTEMPT
4 PROCEEDING --

5 **MS. DORVALL:** YES.

6 **THE COURT:** -- IF HE CLAIMED TO BE NOT ABLE TO
7 REMEMBER. BUT WHAT WE ARE CONCERNED HERE IS WHAT IS THE
8 TESTIMONIAL ASPECT.

9 ASSUMING HE COMPLIES WITH AN ORDER AND HE PUTS IN THE
10 CODE, RIGHT, THAT WOULD BE, ARGUABLY, TESTIMONY THAT HE KNOWS
11 CODE. I THINK IT'S A FOREGONE CONCLUSION, WHETHER HE STILL
12 REMEMBERS IT OR NOT, THAT HE, AT ONE POINT AT LEAST, KNEW THE
13 CODE. IT'S HIS PHONE. THEY'RE HIS APPS. WE HAVE THE KIK
14 MESSAGES. AND MR. SPENCER'S -- I MEAN, IT'S JUST -- THAT'S
15 THAT. SO I DON'T THINK THERE'S ANY FIFTH AMENDMENT PROBLEM
16 THERE.

17 SO LET'S GET TO REALLY WHAT YOUR THEN DISPUTE IS, IS
18 WITH RESPECT TO THE FILES THAT ARE -- ARE BEHIND THE ENCRYPTION
19 THAT MR. SPENCER PUT AND IS PRESENTLY REFUSING TO DECRYPT,
20 RIGHT? THAT IN ITSELF CANNOT BE THE BASIS FOR THE FOREGONE
21 CONCLUSION, THAT THEY'RE ENCRYPTED AND THAT HE'S REFUSING,
22 RIGHT?

23 **MS. DORVALL:** RIGHT.

24 **THE COURT:** THAT IN ITSELF IS NOT SUFFICIENT.

25 BUT BEFORE WE GET TO THAT, I WONDER, BECAUSE IN A 3RD

1 CIRCUIT CASE IN A FOOTNOTE, THEY ACTUALLY SUGGESTED -- AND I
2 THINK THERE'S SOME POWER TO THIS -- THAT REALLY THE ONLY
3 TESTIMONIAL ASPECT ARE THOSE FIRST TWO THINGS, BECAUSE --
4 BECAUSE THE FILES THEMSELVES, IF THEY'RE ON THE PHONE THAT WE
5 KNOW IS HIS, HOW IS IT ANY MORE A FIFTH AMENDMENT VIOLATION THE
6 DISCLOSURE OF THOSE FILES?

7 **MS. DORVALL:** WELL, PART OF THE FOREGONE CONCLUSION
8 REQUIRES THAT THEY HAVE TO PROVE WITH REASONABLE PARTICULARITY
9 THAT THEY ACTUALLY KNOW THE CONTENTS OF THOSE, AND I BELIEVE
10 THAT THEY HAVE NOT SHOWN THAT.

11 AND ALSO IN *APPLE MAC PRO*, THE 3RD CIRCUIT CASE TO
12 WHICH YOU'RE REFERRING --

13 **THE COURT:** YEAH.

14 **MS. DORVALL:** -- THEY WERE ACTUALLY NOT DIRECTLY
15 ADDRESSING THE ISSUE OF TESTIMONY OR THE FIFTH AMENDMENT AS, AT
16 THE DISTRICT COURT LEVEL, HIS COUNSEL FAILED TO OBJECT ON THAT,
17 SO THEY DIDN'T REACH THAT. THEY WERE SIMPLY GOING ABOUT
18 CONTEMPT PROCEEDINGS. SO THEY USED A MUCH, MUCH LOWER STANDARD
19 OF VIEW WHEN THEY WERE LOOKING AT THAT.

20 AND WITH THIS CASE, THEY -- OUR ISSUE WITH THE
21 FOREGONE CONCLUSION IS THAT THEY'RE RELYING ON THE INFORMATION
22 FROM A CODEFENDANT, SOME OF WHICH HAS BEEN CONFIRMED, OTHER
23 PARTS HE SAID HE CANNOT IDENTIFY WHICH LAPTOP WAS WHICH.

24 AND WHEN HE HAD SEEN THESE, IT WAS SEVERAL MONTHS
25 BEFORE THE WARRANT WAS ACTUALLY EXECUTED. AND THERE'S NO

1 EVIDENCE THAT HE DIDN'T OBTAIN A NEW ONE -- LAPTOP IN THAT
2 TIME.

3 SO THE CODEFENDANT'S INABILITY TO IDENTIFY THE LAPTOP
4 SHOWS THAT THEY CAN'T PROVE WITH ANY REASONABLE PARTICULARITY
5 THAT THEY DO ACTUALLY KNOW WHAT'S ON ANY OF THOSE DEVICES.

6 AND WE WOULD SUGGEST THAT, AT THIS POINT, HE SAW HIM
7 PLUG HIS PHONE INTO A COMPUTER. HE'S NOT SURE WHICH COMPUTER
8 IT WAS. HE DIDN'T ACTUALLY SEE THE CONTENTS OF THE PHONES
9 THEMSELVES. SO, REALLY, TO NARROW DOWN OUR ISSUE, OUR ISSUE IS
10 WE DON'T THINK THEY DO ACTUALLY KNOW WHAT'S ON THERE, AND
11 THEY'RE ASKING HIM TO PROVIDE TESTIMONY AGAINST HIMSELF IN THE
12 MANNER THAT, BY DECRYPTING IT, HE WOULD PROVE POSSESSION.

13 **THE COURT:** WE KNOW HE POSSESSED THE PHONE. THAT'S A
14 FOREGONE CONCLUSION.

15 **MS. DORVALL:** YES, BUT --

16 **THE COURT:** THAT'S A FOREGONE CONCLUSION. HE PUT THE
17 PASSWORD IN. IT'S HIS PHONE. IT'S HIS APP. ANYTHING -- ANY
18 FILE THAT'S THERE IS HIS. THAT'S WHY I THINK ACTUALLY THAT
19 FOOTNOTE IS QUITE APT.

20 I DON'T REALLY QUITE UNDERSTAND THAT HOW THERE'S
21 ADDITIONAL TESTIMONY THAT -- THAT'S IT, RIGHT? IT'S HIS PHONE.
22 THEY'RE HIS FILES. IT'S HIS APP.

23 **MS. DORVALL:** BUT THEN THERE IS ALSO THE ISSUE OF
24 SOLE CONTROL. THERE IS SOME CASE LAW THAT SUGGESTS YOU HAVE TO
25 PROVE SOLE CONTROL, OR THE SUGGESTION, AT LEAST, THAT HE'S THE

1 ONLY ONE THAT CAN CONTROL ANY OF THOSE DEVICES.

2 **THE COURT:** OKAY. THERE'S ABSOLUTELY ZERO EVIDENCE
3 HERE, NOR DOES COMMON SENSE SUGGEST THAT ANYBODY ELSE
4 CONTROLLED HIS PHONE.

5 **MS. DORVALL:** BUT IF WE'RE TALKING ABOUT FORCING HIM
6 TO DECRYPT A DEVICE THAT CONTAINS, BASED ON WHAT THE GOVERNMENT
7 IS SUGGESTING, SERIOUS, SERIOUS EVIDENCE OF A CRIME, THEN I
8 THINK THEY HAVE TO PROVE MORE THAN JUST A BELIEF GENERALLY THAT
9 IT CONTAINS INCRIMINATING EVIDENCE. THIS IS HIS FIFTH
10 AMENDMENT RIGHT, AND I DON'T BELIEVE THEY'VE REACHED A FOREGONE
11 CONCLUSION.

12 **THE COURT:** WELL, WHAT IS THE FIFTH AMENDMENT RIGHT?
13 SEE, THAT'S WHY I'M PUSHING YOU ON IT. WHAT IS THE TESTIMONIAL
14 ASPECT TO IT? WHAT IS IT -- THOSE FILES, NO ONE COMPELLED HIM
15 TO CREATE THOSE. THOSE FILES EXISTED LONG BEFORE THE SEARCH
16 WARRANT WAS ACTUALLY ISSUED.

17 **MS. DORVALL:** YES.

18 **THE COURT:** SO HE WASN'T COMPELLED TO PRODUCE THOSE
19 FILES AT ALL. WHAT'S -- WHAT'S -- ALL THAT'S BEING COMPELLED
20 IS DISCOVERY OF THE FILES THAT ARE THERE, THAT WE KNOW ARE
21 THERE.

22 SO -- SO WHAT IS THE TESTIMONIAL ASPECT? THERE IS
23 TESTIMONY THAT HE KNOWS THE PASSWORD SHOULD HE DECRYPT IT.
24 THAT IS TRUE. BUT AS I'VE SAID, I FIND IT'S A FOREGONE
25 CONCLUSION. IT'S ALSO TESTIMONY THAT IT'S HIS PHONE, BUT ALSO

1 A FOREGONE CONCLUSION.

2 **MS. DORVALL:** YEAH. THE TESTIMONIAL ASPECT OF IT
3 WOULD BE THAT HE'D BE FORCED TO PROVIDE EVIDENCE AGAINST
4 HIMSELF. I THINK IT'S THE VERY BASIS OF THE FIFTH AMENDMENT IN
5 THAT --

6 **THE COURT:** OKAY. WHAT CASE SAYS THAT?

7 **MS. DORVALL:** I BELIEVE *U.S. VERSUS HUBBELL* AND *U.S.*
8 *VERSUS DAS* (PHONETIC), THAT HE WOULD BE REQUIRED TO PROVIDE
9 INCRIMINATING EVIDENCE AGAINST HIMSELF.

10 **THE COURT:** NO, IT'S -- IT'S -- IT'S COMPELLED
11 TESTIMONY. SO THERE HAS TO BE SOME TESTIMONIAL ASPECT TO IT,
12 SOME TESTIMONIAL ASPECT TO IT. RIGHT? IT'S NOT JUST PROVIDING
13 EVIDENCE. IT'S NOT THE EVIDENCE. IT'S NOT THE EVIDENCE
14 INCRIMINATING THAT IMPLICATES THE FIFTH AMENDMENT. IT HAS TO
15 BE THAT YOU'RE TESTIFYING.

16 SO IT HAS TO BE THAT THE ACT OF PRODUCTION IS
17 VIOLATING THE FIFTH AMENDMENT. HOW DOES THE ACT OF PRODUCTION,
18 OR HOW DOES -- HERE WE'RE TALKING ABOUT DECRYPTION, RIGHT? IN
19 THE *HUBBELL* CASE, IT WAS BY ACTUALLY PRODUCING THE DOCUMENTS,
20 HE WAS PROVIDING TESTIMONY THAT THE DOCUMENTS ACTUALLY EXISTED
21 BECAUSE THE GOVERNMENT DIDN'T KNOW THAT THEY DID.

22 THERE, RIGHT, IT WAS KIND OF A BROAD SEARCH WARRANT.
23 BUT THAT'S NOT THE CASE HERE. HERE IT'S DECRYPTION. IT'S
24 LIKE -- IT'S THE SAME THING AS IF HE HAD A KEY, RIGHT? IF HE
25 HAD A KEY, WE COULD GET THAT KEY AND UNLOCK IT IF IT WAS IN A

1 LOCKED FILE CABINET, AND THAT WOULDN'T VIOLATE THE FIFTH
2 AMENDMENT, WOULD IT?

3 **MS. DORVALL:** I THINK IT DEPENDS.

4 **THE COURT:** DON'T SAY THAT DEPENDS. CITE ME A CASE,
5 BECAUSE THAT IS ABSOLUTELY NOT THE CASE THAT THE FIFTH
6 AMENDMENT REACHES GETTING A KEY AND UNLOCKING IT. THERE'S NO
7 CASE THAT SUPPORT THAT. SO --

8 **MS. DORVALL:** I BELIEVE THAT THE *HUBBELL* CASE, WHEN
9 THEY WERE DISCUSSING THE ISSUE OF TESTIMONIAL -- THAT BY HIM
10 PROVIDING THE DOCUMENTS, THE DOCUMENTS THEMSELVES IN *HUBBELL*,
11 WHEN IT WAS REALLY TO THE ATTORNEYS IN THAT CASE, BUT WHEN HE
12 PROVIDED TO DOCUMENTS THEMSELVES, POSSESSION OF THE DOCUMENTS
13 THEMSELVES WAS NOT A CRIME. IT WAS WHAT THEY INDICATED.

14 POSSESSION OF ANYTHING THAT THEY ARE SUGGESTING WOULD
15 BE IN THAT PHONE ON ITS FACE IS A CRIME.

16 **THE COURT:** YES, BUT WE ALREADY KNOW HE POSSESSED
17 WHAT'S ON THAT PHONE. THAT IS A FOREGONE CONCLUSION, THAT HE
18 POSSESSED WHAT'S ON THAT PHONE BECAUSE IT'S HIS PHONE. HE PUT
19 THE PASSWORD IN. IT'S HIS PHONE. SO THAT'S A FOREGONE
20 CONCLUSION. HE POSSESSED WHAT'S ON THAT PHONE. SO WHAT IS THE
21 ADDITIONAL TESTIMONIAL ASPECT?

22 **MS. DORVALL:** AT THIS POINT, THEY DON'T KNOW
23 EVERYTHING THAT'S ON THAT PHONE, AND THEY'RE FORCING HIM TO
24 PRODUCE EVIDENCE AGAINST HIMSELF.

25 AND DECRYPTION IS NOT THE SAME AS PUTTING A KEY IN A

1 LOCK. DECRYPTION INCLUDES YOU TAKING EVIDENCE THAT WOULD BE
2 THE SAME AS HAVING BEEN PUT THROUGH A SHREDDER A DOZEN TIMES
3 AND THEN PUTTING IT BACK TOGETHER AND TAPING IT AND HANDING --

4 **THE COURT:** WELL, THAT -- I THINK THAT'S GOING TOO
5 FAR. THE REASON DECRYPTION IS DIFFERENT FROM A KEY IS BECAUSE
6 IT'S IN YOUR HEAD AND YOU HAVE TO DO SOMETHING.

7 **MS. DORVALL:** YES.

8 **THE COURT:** THAT'S THE -- THAT'S THE DIFFERENCE.

9 **MS. DORVALL:** YES.

10 **THE COURT:** THAT'S THE DIFFERENCE.

11 (SIMULTANEOUS COLLOQUY.)

12 **MS. DORVALL:** IT WAS FORCING HIM TO USE THE --

13 **THE COURT:** RIGHT.

14 **MS. DORVALL:** -- CONTENTS OF HIS MIND TO UNLOCK
15 SOMETHING.

16 **THE COURT:** SO BUT THE CONTENTS OF HIS MIND IS THE
17 PASSWORD, AND THAT HE KNOWS THE PASSWORD IS A FOREGONE
18 CONCLUSION. WE'VE ALREADY ESTABLISHED THAT.

19 SO THAT'S WHY I'M WONDERING -- NOW, TO BE FAIR, THERE
20 ARE -- THE CASES KIND OF SUGGEST THAT, IN THE 3RD CIRCUIT IN
21 THAT FOOTNOTE, THOUGH, I THINK THAT WAS QUITE APT. BUT LET'S
22 JUST SKIP THAT FOR A MOMENT, BECAUSE I DON'T EVEN THINK WE NEED
23 TO DO THAT, AND I'LL HAVE MS. GARCIA -- WHY DO YOU -- BECAUSE
24 THE CASES -- EVEN THE 3RD CIRCUIT, I THINK, APPLIED THE
25 REASONABLE PARTICULARITY, TO SOME EXTENT, TO THE CONTENT,

1 RIGHT, WHAT WOULD BE THERE. ALTHOUGH THEY DON'T -- I AM
2 TROUBLED. I DON'T QUITE UNDERSTAND HOW THAT IS TESTIMONIAL,
3 BUT LET'S JUST ASSUME THAT IT IS. WHAT IS THE EVIDENCE OF THE
4 REASONABLE PARTICULARITY SHOWING?

5 **MS. GARCIA:** AS TO THE FACT THAT THERE'S CHILD
6 PORNOGRAPHY ON EACH OF THE DEVICES?

7 **THE COURT:** UNDER -- RIGHT, UNDER THE ENCRYPTED FILE
8 APP.

9 **MS. GARCIA:** YES, SO THE GOVERNMENT HAS SHOWN WITH
10 REASONABLE PARTICULARITY THAT EACH OF THE DEVICES DOES CONTAIN
11 CHILD PORNOGRAPHY, STARTING WITH THE APP ON THE PHONE. FIRST
12 OF ALL, THAT PHONE CONTAINED TONS OF CHILD PORNOGRAPHY THAT
13 WE'VE ALREADY FOUND IN THE KIK MESSAGES, THE ONES EXCHANGED
14 WITH MR. PETERSON AND WITH OTHERS.

15 WE ALSO HAVE THE CORROBORATING TESTIMONY FROM
16 MR. PETERSON WHERE HE TOLD THE GOVERNMENT THAT SPENCER CLAIMED
17 TO USE THAT PHONE TO TAKE SEXUALLY-EXPLICIT PHOTOGRAPHS OF
18 CHILDREN, AND THEN HE WOULD MOVE THOSE PHOTOS FROM THE PHONE'S
19 CAMERA TO A PASSWORD-PROTECTED IPHONE APP, AND LATER THAT WAS
20 THE APP THAT WAS FOUND ON THERE, THE SECRET PHOTO AND VIDEO
21 VAULT PRO, SO THAT WAS CONFIRMED.

22 PETERSON ALSO TOLD THE GOVERNMENT THAT SPENCER USED
23 AN APP THAT MADE THE SCREEN GO BLACK SO THAT HE COULD TAKE
24 PHOTOS WITHOUT IT APPEARING TO BE ON, AND HE WOULD USE THE
25 BUTTONS FOR THE VOLUME TO SURREPTITIOUSLY TAKE PHOTOS. AGAIN,

1 THAT WAS LATER CONFIRMED WHEN THE FBI FOUND AN APPLICATION
2 CALLED SPY CAMERA ON THE PHONE.

3 AND THEN THE KIK MESSAGES SHOW MR. SPENCER HIMSELF,
4 HIS OWN WORDS, SAYING THAT HE USED THAT PHONE TO TAKE
5 SEXUALLY-EXPLICIT IMAGES OF KIDS THAT HE WAS BABYSITTING. HE
6 TALKED ABOUT PROPPING THE PHONE UP IN A BEDROOM AND THEN USING
7 HIS APPLE WATCH TO ACTUALLY MAKE IT TAKE THE PHOTOS SO HE
8 WASN'T IN THE ROOM, BUT THE KIDS WOULDN'T REALIZE THAT THEY
9 WERE BEING PHOTOGRAPHED. AND THEN ON TOP OF THAT, THIS
10 APPLICATION, THIS IS SECRET PHOTO APPLICATION, WHEN IT'S
11 DOWNLOADED, IT HAS A FILE SIZE OF ABOUT 20 MEGABYTES. BUT WHEN
12 THE FBI REVIEWED THE DOCUMENT -- THE PHONE, THE FILE SIZE,
13 INCLUDING EVERYTHING THAT'S STORED INSIDE IT, IS 20 GIGABYTES.
14 IT'S THE LARGEST APPLICATION ON THE PHONE, SHOWING THAT IT WAS
15 USED TO STORE IMAGES.

16 SO TAKEN TOGETHER, THIS MORE THAN MEETS THE STANDARD
17 OF REASONABLE PARTICULARITY TO BELIEVE THAT THAT PARTICULAR
18 APPLICATION CONTAINS THESE IMAGES.

19 **THE COURT:** I MEAN, THE CASES -- I MEAN, THERE'S MORE
20 EVIDENCE HERE THAN PRETTY MUCH ANY CASE OUT THERE THAT HAS
21 ORDERED -- ISSUED AN ORDER OF DECRYPTION.

22 **MS. DORVALL:** I BELIEVE THAT IN THIS CASE, ONE THING
23 THAT DEFINITELY SETS THIS CASE APART FROM PRETTY MUCH ALL CASE
24 LAW ON THE SUBJECT IS THAT THEY ARE BASING ALL OF THIS ON WORD
25 OF A CODEFENDANT. AND THAT CODEFENDANT, WHAT IS IMPORTANT HERE

1 IS, ONE, HE'S SELF-INTERESTED. BUT ASIDE FROM THAT, THE
2 INFORMATION HE ACTUALLY PROVIDED, THE APP THAT THEY'RE TALKING
3 ABOUT IN THE IPHONE, HE NEVER SAW THAT APP DIRECTLY. HE HAS NO
4 IDEA WHAT'S DIRECTLY IN THAT APP. HE KNOWS THAT HE HOOKED HIS
5 PHONE UP TO A COMPUTER, AND HE KNOWS THAT THERE WAS A FILE
6 TRANSFER.

7 HE HAS NO IDEA WHICH APPLICATION THAT CAME FROM, AS
8 FROM THE INDIVIDUAL COMPUTER --

9 (SIMULTANEOUS COLLOQUY.)

10 **THE COURT:** WELL, WE KNOW THIS. WE KNOW ALL THE
11 UNENCRYPTED FILES DON'T HAVE IT.

12 **MS. DORVALL:** WELL, THAT'S --

13 **THE COURT:** SO BUT -- BUT IT WENT THERE. WE ALSO
14 KNOW THIS, WHAT MR. SPENCER SAID ALL HAS BEEN CORROBORATED.
15 LIKE, HOW COULD HE HAVE KNOWN THOSE THINGS. IF YOU SAY, WELL,
16 HE'S JUST MAKING IT UP, BUT IT WAS ALL CORROBORATED.

17 **MS. DORVALL:** I DON'T BELIEVE IT WAS ALL
18 CORROBORATED. I BELIEVE THE KIK MESSAGES WERE, I CONCEDE THAT.
19 THEY HAVE THE KIK MESSAGES AND THE IMAGES THAT THEY SAW.

20 **THE COURT:** HE ALSO SAID THE HARD DRIVE. HE SAID,
21 OH, HE GOT ME THE SAME HARD DRIVE THAT HE GOT FOR HIMSELF. IT
22 TURNED OUT THE EXACT SAME MODEL. HOW COULD HE BE MAKING THAT
23 UP?

24 **MS. DORVALL:** I'M NOT DISAGREEING THAT HE WAS IN THE
25 HOUSE.

1 **THE COURT:** OKAY.

2 **MS. DORVALL:** OR THAT HE WAS AT MR. SPENCER'S HOUSE.
3 WE'RE NOT DISAGREEING THAT HE WAS THERE TO ADMIT HE SAW CERTAIN
4 THINGS. WE'RE JUST SAYING THAT THAT'S NOT SUFFICIENT TO RISE
5 TO THE STANDARD OF REASONABLE PARTICULARITY.

6 **THE COURT:** THAT'S WHAT YOU'RE SAYING, BUT YOU DON'T
7 HAVE ANY CASE LAW THAT SUPPORTS. AND IT'S OKAY, BUT IT'S --
8 IT'S NEW ARGUMENT. I MEAN, IT'S NEW IN THE NINTH CIRCUIT, THE
9 WHOLE THING, SO I UNDERSTAND, BUT EVEN IN ALL THE OTHER CASES,
10 IT'S -- I MEAN, IT'S NEW, IN GENERAL, BECAUSE PEOPLE HAVEN'T
11 HAD THE ABILITY TO DECRYPT, AND THE GOVERNMENT HASN'T HAD THE
12 INABILITY TO UNENCRYPT, AND SO THERE IS NEW CASE LAW.

13 I COULD SEE WHERE THAT IT MIGHT NOT BE SUFFICIENT,
14 BUT IN THIS CASE, WITH MR. SPENCER'S TESTIMONY, ALL OF IT BEING
15 SO CLOSELY CORROBORATED, INCLUDING STUFF THAT HE SAID
16 IMMEDIATELY, SO IT'S NOT EVEN AFTER HIS GUILTY PLEA, IT'S STUFF
17 FROM BEFORE THAT HE SAID IS CORROBORATED. I THINK THAT MAKES
18 THAT ARGUMENT TOUGH HERE.

19 AND, AGAIN, IT'S NOT -- EVEN IN THOSE CASES -- AND,
20 AGAIN, I'M NOT EVEN CLEAR -- IT'S NOT EVEN CLEAR TO ME UNDER
21 THE FIFTH AMENDMENT THAT THEY WOULD BE REQUIRED TO SHOW
22 REASONABLE PARTICULAR KNOWLEDGE OF THE CONTENT, BUT ASSUMING
23 THAT THEY ARE, IT'S NOT EXACT KNOWLEDGE, RIGHT? IT'S
24 REASONABLE PARTICULARITY. THIS SEEMS PRETTY PARTICULAR. I
25 DON'T KNOW HOW YOU WOULD GET MORE PARTICULAR.

1 **MS. DORVALL:** I WOULD SAY SPECIFICALLY IT'S TO THE
2 LAPTOP. I THINK THAT IS THEIR WEAKEST ARGUMENT, BECAUSE HE
3 COULDN'T IDENTIFY WHICH LAPTOP MR. SPENCER POSSESSED. SO I
4 WOULD ARGUE THAT SPECIFICALLY TO THAT ALIENWARE LAPTOP, THEY
5 DON'T HAVE REASONABLE PARTICULARITY AS TO THAT.

6 **THE COURT:** I THOUGHT THERE WAS TWO, BUT THERE WAS
7 ONLY ONE WORKING?

8 **MS. GARCIA:** THAT'S RIGHT, YOUR HONOR. THERE WAS A
9 BLACK LENOVO LAPTOP THAT HAD NO HARD DRIVE IN IT. SO IF MR. --
10 IF SPENCER WAS USING A COMPUTER, WHICH THIS ONE WAS FOUND ON
11 HIS DESK, IT WAS FOUND NEXT TO THE TRANSCEND EXTERNAL HARD
12 DRIVE -- AGAIN, MR. SPENCER GAVE THE PASSWORD TO IT.

13 IN FACT, THIS ISN'T IN THE PAPERS. WE'VE JUST
14 RECENTLY FOUND IN FURTHER REVIEW OF THE COMPUTER IN THE
15 UNENCRYPTED PORTIONS OF THAT HARD DRI- -- OF THE ALIENWARE
16 LAPTOP, WE HAVE NOW FOUND CHILD PORNOGRAPHY.

17 OBVIOUSLY, THE MOTION FOCUSES ON THE ENCRYPTED
18 PARTITIONS, BUT I'LL REMIND THE COURT THAT MR. PETERSON TOLD US
19 THAT MR. SPENCER CLAIMED TO KEEP THE CHILD PORNOGRAPHY IN AN
20 ENCRYPTED PORTION OF HIS LAPTOP.

21 **THE COURT:** WELL, IN A PARTITION, RIGHT?

22 **MS. GARCIA:** YEAH.

23 **THE COURT:** AND ON THE ALIENWARE, THERE IS, IN FACT,
24 AN ENCRYPTED --

25 **MS. GARCIA:** AN ENCRYPTED --

1 **THE COURT:** -- PARTITION. AGAIN, IT JUST MATCHES
2 EXACTLY WITH WHAT MR. PETERSON SAID.

3 **MS. DORVALL:** THERE ARE TWO LAPTOPS IN -- AT THIS
4 TIME THAT MR. PETERSON OBSERVED THIS, WAS SEVEN TO EIGHT MONTHS
5 PRIOR TO THE SEARCH WARRANT BEING EXECUTED. SO THERE'S NO WAY
6 TO KNOW IF IT WAS THE LENOVO LAPTOP OR IF IT WAS THE ALIENWARE
7 LAPTOP HE SAW --

8 **THE COURT:** WELL.

9 **MS. DORVALL:** -- BECAUSE HE CAN'T PERSONALLY, UPON
10 LOOKING AT THEM, IDENTIFY WHICH ONE IT WAS.

11 **THE COURT:** BUT THERE IS A -- BUT WITH REASONABLE
12 PARTICULARITY, IT'S NOT THAT YOU HAVE TO KNOW FOR CERTAIN.
13 AND, FRANKLY, IF IT WAS BEYOND A REASONABLE DOUBT, I THINK THAT
14 STANDARD MIGHT BE MET ANYWAY. I MEAN, HE SAYS IT WAS A BLACK
15 LAPTOP THAT WAS -- HAD THIS ENCRYPTED PARTITION. IT'S A BLACK
16 LAPTOP THAT HAS THIS ENCRYPTED PARTITION, AND IT'S THE ONLY
17 WORKING LAPTOP THAT WAS SITTING THERE.

18 **MS. DORVALL:** BUT WE DON'T KNOW IF AT THE TIME HE HAD
19 TWO WORKING LAPTOPS.

20 **THE COURT:** NO, WE DON'T KNOW, BUT WE HAVE NO REASON
21 TO BELIEVE THAT HE DID, EITHER.

22 BUT -- WELL, ANYWAY, I'M INTRIGUED BY THIS, WHY WE
23 EVEN NEED TO DO THIS. WHAT'S TESTIMONIAL ABOUT THAT AT ALL,
24 SINCE ALL WITH WE'RE DOING IS UNCOVERING DOCUMENTS WHICH
25 PREEXISTED? NOBODY COMPELLED HIM TO MAKE IT. HE IS BEING

1 COMPELLED TO PUT IN THE PASSWORD. SO THAT'S TESTIMONIAL.

2 **MS. DORVALL:** YES. AND HE WOULD BE COMPELLED TO USE
3 THE CONTENTS OF HIS MIND TO DO THAT.

4 **THE COURT:** YES.

5 **MS. DORVALL:** WHICH, AS YOU USED THE EXAMPLE OF A
6 KEY, IT'S NOT THE SAME AS A PHYSICAL ITEM.

7 **THE COURT:** NO, NO, NO. BUT IT'S A FOREGONE
8 CONCLUSION THAT HE KNOWS THE PASSWORD. SO THAT'S WHY IT FALLS
9 INTO THAT. I MEAN, THAT'S WHY WE'RE EVEN IN THE FIFTH
10 AMENDMENT REALM AT ALL, BECAUSE THAT IS. BUT HE'S NOT REQUIRED
11 TO BE -- AT THAT -- AFTER THAT POINT, HE'S NOT REQUIRED TO USE
12 HIS MIND AT ALL.

13 **MS. DORVALL:** NO, BUT HE'S STILL PROVIDING EVIDENCE.
14 AND AT THIS POINT, THEY ARGUE IN THEIR PAPERS IT'S
15 NOT A FISHING EXPEDITION, WHICH PRESUMES THAT THEY KNOW
16 EVERYTHING THAT'S ON THE PHONE, THE ALIENWARE LAPTOP AND ON THE
17 EXTERNAL HARD DRIVE.

18 **THE COURT:** WITH REASONABLE PARTICULARITY.

19 **MS. DORVALL:** YES, BASED ON WHAT MR. PETERSON SAID.
20 AND I WOULD SUBMIT THAT AT THIS POINT THEY DON'T KNOW, AND
21 PHONES AND COMPUTERS AND ALL OF THAT, AS SHOWN IN THE NINTH
22 CIRCUIT, ARE NOT EXACTLY THE SAME THING AS BANK PAPERWORK THAT
23 THEY HAVE USED IN OTHER CASE BECAUSE IT CONTAINS ASPECTS OF
24 YOUR LIFE THAT WOULD NOT BE --

25 (SIMULTANEOUS COLLOQUY.)

1 **THE COURT:** THAT'S WHY YOU HAVE TO GET A WARRANT.
2 EXACTLY. AND WHAT DO WE HAVE HERE? A WARRANT. A WARRANT
3 WHICH MR. SPENCER IS INTERFERING WITH. THAT'S WHAT IT IS.
4 THEY'VE MET THAT BURDEN. YOU HAVE TO GET A WARRANT, THAT'S
5 RIGHT, FOR A PHONE. THE SUPREME COURT MADE THAT CLEAR LAST
6 YEAR. TO SEARCH A PHONE, YOU HAVE TO GET A WARRANT. THEY GOT
7 IT. IT WAS SIGNED.

8 **MS. DORVALL:** YES.

9 **THE COURT:** BUT NOW YOU'RE SAYING BUT EVEN -- SO
10 THAT'S MET. SO THAT CAN'T BE THE ARGUMENT.

11 **MS. DORVALL:** YEAH, THEY NEED A WARRANT TO SEARCH THE
12 PHONE, BUT I STILL BELIEVE HIS FIFTH AMENDMENT PROTECTION
13 EXTENDS TO HIM NOT BEING FORCED TO USE THE CONTENTS OF HIS MIND
14 TO UNLOCK THAT PHONE. THEY HAVE SEVERAL TECHNIQUES, AS THEY
15 STATED, AND THEY'VE APPARENTLY MADE PROGRESS, IN THE TIME THAT
16 THIS HAS BEEN FILED, TOWARD DECRYPTING THAT. I DON'T BELIEVE
17 IT'S NECESSARY --

18 **THE COURT:** I BELIEVE SHE SAID IT WAS AN UNENCRYPTED
19 PART OF THE LAPTOP.

20 **MS. GARCIA:** THAT'S RIGHT, YOUR HONOR. IN THE
21 UNENCRYPTED PORTION OF THE ALIENWARE. WE HAVE NOT MADE
22 PROGRESS IN DECRYPTING THE ENCRYPTED PORTION OF THE LAPTOP.

23 **MS. DORVALL:** BUT I BELIEVE THAT UNDER THE FIFTH
24 AMENDMENT, THEY HAVE TOOLS TO DO THIS.

25 **THE COURT:** WHAT --

1 **MS. DORVALL:** THEY DON'T NEED TO FORCE MR. SPENCER TO
2 TESTIFY AGAINST HIMSELF BY USING THE CONTENTS OF HIS MIND TO
3 UNLOCK SOMETHING THAT IS, BY ALL INDICATIONS, INCREDIBLY
4 INCRIMINATING AGAINST HIMSELF. I JUST BELIEVE --

5 **THE COURT:** BUT IT'S A FOREGONE CONCLUSION. THAT'S
6 THE ISSUE. THAT'S THE PROBLEM. IT IS A FOREGONE CONCLUSION.

7 BUT, AGAIN, THE TESTIMONIAL ASPECT IS THAT HE KNOWS
8 PASSWORD.

9 **MS. DORVALL:** THAT HE WOULD BE FORCED TO USE THE
10 CONTENTS OF HIS MIND, YES.

11 **THE COURT:** TO DISCLOSE THE PASSWORD.

12 **MS. DORVALL:** THE PASSWORD OR THE ENCRYPTION KEY.

13 (SIMULTANEOUS COLLOQUY.)

14 **THE COURT:** EXACTLY. RIGHT. NO, THAT IS -- THAT'S
15 WHY WE'RE IN THE FIFTH AMENDMENT REALM AT ALL, RIGHT?

16 **MS. DORVALL:** YES.

17 **THE COURT:** BUT THAT'S A FOREGONE CONCLUSION THAT HE
18 KNOWS IT, BECAUSE IT'S HIS PHONE --

19 **MS. DORVALL:** I DON'T BELIEVE THAT THAT'S -- THAT'S
20 THE ISSUE, THOUGH, THAT HE KNOWS IT. THAT HE KNOWS IT GOES
21 MORE TOWARDS POSSESSION AND CONTROL. IT'S HIM BEING FORCED TO
22 APPLY THAT KNOWLEDGE THAT GETS US TO THE FIFTH AMENDMENT, BY
23 HIM BEING FORCED TO GIVE THEM THAT INFORMATION.

24 **THE COURT:** NO, HE'S ONLY BEING FORCED -- THE ORDER
25 IS ONLY GOING TO REQUIRE HIM TO DECRYPT, PUT THE PASSWORD IN.

1 **MS. DORVALL:** RIGHT. BUT ONCE HE DOES THAT, THAT
2 PROVES PARTS OF THEIR CASE BECAUSE ELEMENTS OF THE CASE ARE
3 POSSESSION.

4 **THE COURT:** THAT'S ALREADY BEEN PROVED BECAUSE IT'S
5 HIS PHONE. WHATEVER'S ON THAT PHONE HAS ALREADY BEEN PROVED.
6 IT'S HIS PHONE. IT'S HIS PHONE. JUST LIKE EVERYTHING THAT'S
7 NOT ENCRYPTED, THAT'S BEEN PROVED.

8 **MS. DORVALL:** BUT THEY'VE PROVEN THAT WITHOUT
9 ASSISTANCE, AND THEY SAY THEY COULD --

10 **THE COURT:** WELL, ACTUALLY, THEY DID HAVE HIS
11 ASSISTANCE. HE VOLUNTARILY PUT IN THE PASSWORD. WELL,
12 ARGUABLY.

13 ALL RIGHT. WHAT ABOUT THAT, ABOUT WHETHER -- WHY YOU
14 ACTUALLY HAVE TO SHOW REASONABLE PARTICULARITY AS TO THE
15 CONTENTS?

16 **MS. GARCIA:** ARGUABLY, YOU'RE RIGHT, YOUR HONOR. I
17 AGREE THAT FOOTNOTE IN THE 3RD CIRCUIT MAKES PERFECT SENSE.
18 FOR EXAMPLE, I KNOW THE PASSWORD TO MY MOM'S PHONE, AND I COULD
19 UNLOCK IT FOR YOU, BUT I DON'T KNOW WHAT SHE HAS ON IT. SO
20 KNOWLEDGE OF THE PHONE -- KNOWLEDGE OF THE PASSCODE DOESN'T
21 MEAN YOU HAVE KNOWLEDGE OF THE CONTENTS, AND, THEREFORE JUST
22 BEING ABLE TO PRODUCE THESE DEVICES IN AN UNENCRYPTED STATE
23 DOESN'T SAY ANYTHING ABOUT WHAT'S ON THEM. PLENTY OF PERFECTLY
24 NORMAL NONCONTRABAND ITEMS COULD BE ON THE DEVICES, AND THAT'S
25 NOT SOMETHING THAT'S COMMUNICATED INHERENTLY BY THE ACT OF

1 DECRYPTING IT.

2 TO BE SAFE, GIVEN THAT THE 3RD CIRCUIT AND THE 11TH
3 CIRCUIT BOTH INQUIRED INTO THIS, AND GIVEN THAT OBVIOUSLY WE'VE
4 SEIZED THESE DEVICES WITH A SEARCH WARRANT, SHOWED PROBABLE
5 CAUSE TO BELIEVE THEY CONTAINED CHILD PORNOGRAPHY, WE'RE KIND
6 OF ERRING ON THE SIDE OF CAUTION HERE AND SHOWING THAT WE CAN
7 ALSO SHOW THAT IT'S FOREGONE CONCLUSION THAT THEY CONTAIN CHILD
8 PORNOGRAPHY.

9 AND WE'D RESPECTFULLY REQUEST THAT IF THE COURT IS
10 INCLINED TO GRANT THE APPLICATION, THAT YOU MAKE FINDINGS AS TO
11 THOSE --

12 **THE COURT:** NO, NO, NO. I WOULD DO IT IN THE --
13 ALTERNATIVELY, YEAH.

14 **MS. GARCIA:** BUT I CERTAINLY AGREE WITH YOUR
15 REASONING, THAT KNOWING THE PASSWORD DOESN'T ACTUALLY SAY
16 ANYTHING ABOUT WHAT'S ON THE DEVICES.

17 **THE COURT:** ALL RIGHT. ANYTHING FURTHER?

18 **MS. DORVALL:** NO, YOUR HONOR.

19 **THE COURT:** OKAY. ALL RIGHT. WELL, I'M GOING TO
20 GRANT THE WRIT. I'LL ISSUE A WRITTEN ORDER, BECAUSE THIS IS AN
21 ISSUE OF FIRST IMPRESSION IN THIS CIRCUIT.

22 HAVE YOU SUBMITTED A PROPOSED ORDER, NOT
23 SUBSTANTIVELY, BUT WITH RESPECT TO THE WORDING OF THE ORDER?

24 **MS. GARCIA:** WE SUBMITTED A KIND OF STANDARD, YOU
25 KNOW, TWO PARAGRAPH, ONE ABOUT MAKING THE DEVICES AVAILABLE IN

1 THE COURTROOM, AT WHICH POINT MR. SPENCER COULD TYPE IN THE
2 PASSWORDS OR UNLOCK THEM IN WHATEVER WAY NECESSARY OUTSIDE THE
3 PRESENCE OF THE GOVERNMENT. SO WE SUBMITTED THAT. NOTHING
4 SUBSTANTIVE ABOUT THE ANALYSIS OF THE FIFTH AMENDMENT.

5 **THE COURT:** RIGHT. RIGHT. OKAY. ALL RIGHT. WELL,
6 I IMAGINE THERE WILL BE FURTHER PROCEEDINGS IN ANY EVENT BEFORE
7 THAT HAPPENS.

8 OKAY. THANK YOU.

9 **MS. GARCIA:** THANK YOU, YOUR HONOR.

10 (PROCEEDINGS ADJOURNED AT 11:40 A.M.)
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CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF
THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE
U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE
PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE
ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE
ACTION.


JOAN MARIE COLUMBINI

MARCH 28, 2018